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ARTICLES

COMPARATIVE AMERICAN JUDICIAL SYSTEMS

*Jeffrey A. Parness**

I. INTRODUCTION

Far too often when we discuss American courts and their judicial systems, we take little note of the significant differences in the ways in which cases are handled and law is practiced. We probably contemplate the dichotomy between trial and appellate courts; between rural and urban courts; between general and special jurisdiction courts; between state and federal courts; between courts with elected and selected judges; and between civil and criminal courts. We also surely contemplate the differences in attitudes, work habits, ideology, staff and the like which separate individual judges, and we inevitably contemplate the divergent judicial approaches to the balance of individual and societal interests. In the last decade, there has been special attention paid to fundamental rights, particularly those normally asserted within the judicial branch; including search and seizure, jury trial, self-incrimination, speedy trial, competent counsel, public access, cruel and unusual punishment, and confrontation.

What we so frequently miss in our discussion of case management and legal practice are the differences in the constitutional foundations of the varying American judicial systems. Not only is the judicial article of the federal constitution dramatically different from the judicial articles of many states, but also the judicial articles of many states are quite distinct from one another. Fur-

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ther, quite unlike article III of the federal constitution,¹ many state judicial articles have undergone significant alterations.

Perhaps the failure to discuss differences in American judicial articles can be attributed to the view that any differences in constitutional foundation are meaningless in that no practical consequences flow. In effect, this view parallels the popular notion that all seemingly comparable courts in America actually have comparable powers and that whatever differences exist originate from such non-constitutional sources as political ideology and community setting. This view of comparability is troubling, for constitutional differences should (and sometimes do) result in practical consequences. Under current American constitutional law, all American trial courts should not (and do not) possess the same power to make substantive law. All American courts of last resort should not (and do not) possess the same inherent authority to regulate the practice of law. Moreover, all American courts should not (and do not) possess the same responsibility for checking legislative inroads on judicial prerogatives.

This article will first explore some of the differences between federal and state judicial articles, as well as some of the differences over time in the judicial article of a single state. More serious consideration of the noted differences in constitutional language is encouraged. The conclusion is that an increased sensitivity to differences in individual rights from state to state, and between the federal and state governments, should develop a heightened recognition of, and respect for, differences in the structure, function and operation of the judicial systems contemplated by the American constitutions.

II. THE FEDERAL AND ILLINOIS CONSTITUTIONS

A brief comparison of the present federal and Illinois judicial articles demonstrate the variety of approaches to judicial power in American constitutional law.

Article III of the Federal Constitution² has remained unchanged since its inception (except for the eleventh amendment's³ unclear directives about sovereign immunity which affects Article III). The

1. U.S. CONST. art. III; *see infra* notes 2-6.

2. U.S. CONST. art. III.

3. *Id.* amend. XI.

article provides that the federal judicial power "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁴ Under its provisions, federal court jurisdiction, procedure, and financial support have been generally recognized as subject to congressional mandate. Further, legislative authority over federal courts is recognized in other articles, exemplified by the article I grant to Congress of the power to "constitute Tribunals inferior to the supreme Court"⁵ and by the article IV grant to Congress of the power over the territory of the United States.⁶

By contrast, the varying judicial articles in Illinois history demonstrate an increasing judicial, and a diminishing legislative responsibility for defining judicial power. They also have increasingly prompted state, rather than local, financing of Illinois courts.

Under the Illinois Constitution of 1818,⁷ the powers of government were divided between the legislative, executive and judicial departments. No department was to exercise any powers of another unless "expressly directed or permitted."⁸ The legislative department was, however, expressly granted significant duties regarding the judicial department. For example, one provision said: "The judicial power of this state shall be vested in one supreme court, and such inferior courts as the general assembly shall . . . ordain and establish."⁹ This provision tracks article III. Other early Illinois provisions authorized the legislature to require high court justices to "hold circuit courts",¹⁰ as well as to provide for the appointment and duties of justices of the peace.¹¹

Under the Illinois Constitution of 1848,¹² legislative duties regarding the Illinois courts were continued but reduced. The legislature could authorize "courts of justice" to grant divorces¹³ and could direct "in what manner suits may be brought against the state."¹⁴ It could no longer require high court justices to "hold cir-

4. *Id.* art. III, § 1.

5. *Id.* art. I, § 8.

6. *Id.* art. IV, § 3.

7. ILL. CONST. of 1818.

8. *Id.* art. I, § 2.

9. *Id.* art. IV, § 1.

10. *Id.* § 4.

11. *Id.* § 8.

12. ILL. CONST. of 1848.

13. *Id.* art. III, § 32.

14. *Id.* § 34.

cuit courts.”¹⁵ Most importantly, the legislature’s total control over lower court structure was eliminated. A new provision declared:

The judicial power of this state shall be and is hereby vested in one supreme court, in circuit courts, in county courts, and in justices of the peace: *Provided*, that inferior local courts . . . may be established by the general assembly in the cities . . . but such courts shall have uniform organization and jurisdiction¹⁶

No longer were all lower courts ordained and established by the legislature. Further, the jurisdiction of the circuit courts was defined constitutionally.¹⁷ Such lower officials as county judges and justices of the peace continued, however, to be subject to significant legislative directive.¹⁸

Under the Illinois Constitution, as amended in 1870, there was a further erosion of legislative authority over judicial power. The General Assembly could not pass local or special laws regulating practice in courts of justice, regulating the jurisdiction and duties of certain judges, concerning changes of venue, summoning and impaneling juries, or concerning any other area where a general law could be applicable.¹⁹ Furthermore, legislative control over the judicial power in the lower courts was diminished, as exemplified by the new provisions on the jurisdictional authority of county and probate courts.²⁰ Nevertheless, the 1870 constitution continued to permit significant legislative control over some courts. It expressly recognized legislative authority to create “inferior appellate courts,”²¹ and to establish a “probate court in each county having a population over 50,000.”²²

General Assembly responsibility for courts was dramatically reduced in the constitutional amendments of 1962. One amendment provided: “The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts.”²³ No longer were lower courts to be established legislatively. Other amendments wholly or sub-

15. ILL. CONST. of 1818, art. IV, § 4.

16. ILL. CONST. of 1848, art. V, § 1.

17. *Id.* § 8.

18. *Id.* §§ 18, 19.

19. ILL. CONST. of 1870, art. IV, § 22.

20. *Id.* art. VI, §§ 18, 20.

21. *Id.* § 11.

22. *Id.* § 20.

23. *Id.* § 1 (1962).

stantially eliminated legislative authority over the jurisdiction of lower courts.²⁴ In addition, an amendment declared that the supreme court was vested with "[g]eneral administrative authority over all courts," with no express recognition of the opportunity for legislative review.²⁵

The movement toward increased constitutional authority for Illinois courts continued under the 1970 constitution. Thus, while a 1962 amendment granted the Supreme Court of Illinois the authority to provide by rule for direct appeal in certain cases from the circuit courts to the high court "subject to law hereafter enacted,"²⁶ the 1970 constitution recognized such supreme court rules without mentioning the impact of legislation.²⁷ In addition, the 1970 constitution declared that the "Supreme Court shall adopt rules of conduct for Judges and Associate Judges," with no mention of legislative review.²⁸

The trend in Illinois is clear. Constitutional history from 1818 to 1970 reflects diminishing legislative control of the Illinois judicial system. Over the years, the General Assembly's power to create courts and procedural law for the legal profession has diminished. Increasingly, constitutional mandates appear regarding the structure of courts and their powers. Such mandates, where ambiguous, are ultimately clarified by judges. Thus, judges increasingly are compelled in Illinois to define the contours of their own constitutional duties, as well as the necessary means by which such duties must be undertaken. Ironically, while General Assembly control over court jurisdiction and procedure has lessened, its assumption of the financial burden of Illinois courts has grown.

The division of responsibilities in Illinois contrasts sharply with the jurisdictional and procedural law duties performed by federal legislators and judges. Article III of the United States Constitution has always dictated that federal judicial power is "vested . . . in such inferior courts as the Congress may from time to time ordain and establish."²⁹

24. Compare ILL. CONST. of 1870, art. VI, § 12 with ILL. CONST. of 1870, art. VI, § 9 (1962) (circuit court); ILL. CONST. of 1870, art. VI, § 11 with ILL. CONST. of 1870, art. VI, § 7 (1962) (appellate court).

25. ILL. CONST. of 1870, art. VI, § 2 (1962).

26. *Id.* § 5 (1962).

27. ILL. CONST. art. VI, § 4(b).

28. *Id.* § 13(a).

29. U.S. CONST. art. III, § 1, cl. 1.

III. OTHER AMERICAN CONSTITUTIONS

The differences in American constitutional provisions relating to judicial systems are magnified when other states' histories and current circumstances are examined. Generally, the trend in the states has been toward constitutionalizing the judiciary and its responsibilities—a pattern reflected in Illinois. The trend was fueled, if not fired, by the push for unified state court systems.³⁰ The push was prompted by concerns about the multiplicity of courts, the existence of concurrent jurisdiction, the congestion in the courts and the inefficient use of judges. It is exemplified by Roscoe Pound's famous 1906 address on the causes of popular dissatisfaction with the administration of justice.³¹ The movement toward constitutionalization was made easier in the twentieth century by the efforts of such national organizations as the American Bar Association, the American Judicature Society and the National Municipal League.³²

Because of the incompleteness of the movement toward constitutionally defining American judicial systems, and because some states have moved further than Illinois, many states presently have provisions in their judicial articles quite different from article III and from any of the previously mentioned Illinois provisions. Consider the variety of constitutional provisions which now exist regarding judicial promulgation of standards governing legal practice, including rules of civil, criminal, and appellate procedure, rules of evidence, and rules of attorney and judicial conduct.

Article III of the United States Constitution³³ contains no express provision on judicial authority to promulgate legal practice standards; to the extent that federal judicial rulemaking exists, it is chiefly dependent upon statutes which delegate to judges rulemaking powers.³⁴ These statutes reserve opportunity for Congressional oversight prior to the effectiveness of most judicially-promulgated rules.³⁵ By contrast, the Illinois judicial article does

30. For a description of the concept of and movement toward unified court systems, see Ashman & Parness, *The Concept of a Unified Court System*, 24 DE PAUL L. REV. 1 (1974).

31. Address by Roscoe Pound, *The Causes of Popular Ratification with the Administration of Justice*, reprinted in 46 J. AM. JUD. SOC. 55 (1962).

32. Ashman & Parness, *supra* note 30, at 2-17.

33. U.S. CONST. art. III.

34. See, e.g., 28 U.S.C. §§ 2071, 2072, 2075, 2076 (1982). These provisions authorize the Supreme Court to exercise general rule-making power; prescribe, by general rules, the formal process, writs, pleadings, motions, practice and procedure regarding the rules of civil procedure and bankruptcy; and prescribe amendments to the Federal Rules of Evidence.

35. Compare 28 U.S.C. § 2072 (1982) (civil procedure rules are not to take effect until 90

expressly provide for certain judicial rulemaking, including rules regarding certain appeals and rules of conduct for judges.³⁶ These provisions do not mention legislative oversight. In other states, there is even greater express recognition of judicial rulemaking power. Among the states, constitutional provisions on judicial rulemaking vary greatly in the role assigned to the legislature.

A more expansive judicial rulemaking power expressly recognized in the constitutional text is the provision from Arkansas which states: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law."³⁷ A different, but comparably broad, constitutional delegation of judicial rulemaking power is found in the Missouri provision empowering the supreme court to "establish rules relating to practice, procedure and pleading for all courts."³⁸ On occasion, state judicial articles recognize expressly not only judicial rulemaking power, but also legislative authority to establish standards guiding the courts. Some articles also recognize legislative authority to delegate to the judiciary the power to make rules. A provision in Colorado declares:

The supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases, except that the general assembly shall have the power to provide simplified procedures in county courts for claims not exceeding five hundred dollars and for the trial of misdemeanors.³⁹

In North Carolina, legislative authority over the procedural rules of trial courts is expressly recognized, though the possible delegation of such authority is noted.⁴⁰

While the United States Constitution makes no mention of judicial rulemaking, and the Illinois judicial rulemaking provisions make no mention of legislative oversight, other American constitutions vary significantly in the role assigned to the legislature in the

days after they are reported to Congress) with 28 U.S.C. § 2076 (1982) (180-day waiting period for amendments to Federal Rules of Evidence to take effect after they are reported to Congress).

36. ILL. CONST. art. VI, §§ 6, 13(a).

37. ARK. CONST. amend. 28.

38. MO. CONST. art. V, § 5.

39. COLO. CONST. art. VI, § 21.

40. N.C. CONST. art. IV, § 13(2).

judicial establishment of standards governing legal practice. Some provisions mandate that judicial rules not contravene any existing statutes,⁴¹ while others dictate that judicial rules not conflict with existing statutes addressing only certain issues.⁴² However, other provisions seemingly permit judicial rules to supercede statutes.⁴³

State constitutions vary on whether judicial rulemakers must submit their rules to the legislature before the rules can take effect. As noted earlier, the Illinois provisions fail to mention any legislative oversight. In Ohio, certain proposed judicial rules cannot take effect unless the houses of the general assembly have been afforded the chance to adopt "a concurrent resolution of disapproval."⁴⁴ In South Carolina, certain rules operate under similar constraints, with disapproval occurring with "the concurrence of three-fifths of the members of each House present and voting."⁴⁵

By contrast, some state constitutions contemplate that the work of judicial rulemakers is usually overseen by the legislature only after the rules take effect. In Florida, the supreme court can adopt certain rules without first referring them to the legislature; but, these judicially-promulgated rules "may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature."⁴⁶ In Maryland, certain judicial rules only have force "until rescinded, changed or modified . . . by law."⁴⁷ In Montana, certain judicial rules are "subject to disapproval by the legislature in either of the two sessions following promulgation."⁴⁸

Besides constitutional differences in the structure, jurisdictional authority, and rulemaking powers of American courts, significant divergence can also be found in such areas as court finance, the techniques of choosing and removing judges, the terms of judicial office, and judicial responsibility for rendering advisory opinions at the request of the legislature. Certain courts are state-financed

41. See LA. CONST. art. V, § 5; NEB. CONST. art. V, § 25.

42. See MO. CONST. art. V, § 5(A) (rules cannot change the substantive rights or law relating to evidence, the oral examination of witnesses, juries, the right to trial by jury, or the right of appeal).

43. See N.C. CONST. art. IV, § 13(2) (exclusive high court authority to make rules of procedure and practice for the appellate courts).

44. OHIO CONST. art. IV, § 5(B) (practice and procedure rules for all courts of the state).

45. S.C. CONST. art. V, § 4(A) (practice and procedure rules for all courts of the state).

46. FLA. CONST. art. V, § 2(a) (practice and procedure rules).

47. MD. CONST. art. IV, § 18(a) (practice and procedure rules).

48. MONT. CONST. art. VII, § 2(3) (practice and procedure rules, professional conduct rules, and appellate procedure rules).

while others are locally-financed. Judges may be elected in partisan or non-partisan elections. American judges serve terms ranging from two to fifteen years. State high courts may or may not have to advise the legislature on the legality of proposed statutes. Variations among American governments in these areas should result in further differences in the separation of powers, particularly in the relationships between the legislative and judicial branches.

IV. THE SIGNIFICANCE OF DIFFERENCES IN AMERICAN JUDICIAL ARTICLES

So what of these differences in constitutional laws relating to American judicial systems? How might they properly influence the resolution of troubling issues now facing American courts?

Consider first issues involving legislative authority to remove responsibility for resolving civil disputes from traditional courts established under a judicial article and to place such responsibility in administrative agencies, quasi-courts or others. Such removals are increasingly attractive to legislators concerned with the extreme delays in, as well as the high costs of, traditional litigation. Even with an expressly-recognized right to trial by jury, should not such a removal be easier for a legislature if that body is chiefly responsible for defining the jurisdictional authority of the state's judiciary? Is not removal more problematic where trial court authority over the diverted cases is constitutionally-recognized?

Consider, by comparison, issues involving legislative authority to place caps on certain kinds of damages, such as non-economic damages in tort actions, or to abolish certain kinds of damages altogether such as punitive damages. Should not such legislative authority be easier to sustain if the state courts' jurisdictional powers are not constitutionally defined but subject to legislative invention? A court whose power to hear a case is dependent upon legislative will is in a seemingly weaker position to question such a cap than is a court invested with the constitutional responsibility to hear and resolve the case. In other words, the power to make common law rulings contravening statutes is more doubtful when the power to adjudicate the dispute is itself dependent upon statute. Courts looking to strike down such damage caps as an infringement on judicial authority have focused on the constitutionally-protected right to jury trial rather than on their own constitution-

ally-assigned power to resolve disputes.⁴⁹ This seems wrong, because the jury is infrequently viewed as the determiner of the substantive law and thus the jury typically is asked only to apply the facts it finds to the law determined by others.

Consider, similarly, issues involving legislative responsibility to fund courts in an adequate manner. Should not such a responsibility be taken more seriously if huge backlogs in the processing of civil cases exist and if the relevant judicial article dictates court responsibility for such cases (especially if individual constitutional interests such as jury trial, access to the courts, and a remedy for every wrong are at stake)? Recently, the Los Angeles County Bar Association sued various state officers to get more state court judges. When the suit was initiated, the typical non-priority civil suit took "at least 58 months to [get] to trial despite a state law requiring dismissal of untried cases after five years."⁵⁰ A suit of this nature might be founded on the infringement of individual constitutional rights, such as the right to a speedy trial—albeit for civil case, or the right not to have the civil jury trial right abolished *de facto*. However, the suit could also be grounded on separation of powers principles involving undue legislative interference with judicial responsibility.

Also, consider issues involving the responsibility for guiding the practice of law, including regulations on admission to legal practice, on the discipline of those so admitted, on judicial ethics, and on the conduct of non-lawyers constituting the unauthorized practice of law. Many courts simply note their inherent powers and then proceed to declare the responsibility for guiding legal practice lies with the judiciary. Should not such inherent authority be easier to sustain if the courts are constitutionally established and empowered? If the high court is given the constitutional duty to hear admission to practice and lawyer discipline cases or if the high court or some other body of judges is constitutionally delegated express rulemaking powers over court practices and procedures, then would inherent authority not be easier to sustain as well? Courts whose creation, jurisdiction and rules are dependent upon some form of legislative initiative seemingly derive their power over legal practice from the statutes. Such power, when balanced

49. See, e.g., *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, ___, 757 P.2d 251, 258 (1988).

50. Marcotte, *L.A. County Bar Sues California*, 74 A.B.A. J. Feb. 1, 1988, at 28.

against legislative authority, seems much weaker than judicial power inhering in constitutional provisions.

The importance of the differences in American judicial articles can be demonstrated finally by reviewing a few judicial actions concerning legislative authority over the ways in which judges promulgate legal practice rules. In particular, this discussion will focus upon two judicial actions in 1977 involving statutes requiring that judicial rulemaking hearings be noticed and open to the public.

In the first action, the Michigan high court sent a letter to Michigan's Governor, Lieutenant Governor and Speaker of the House of Representatives.⁵¹ The court was concerned about the recently adopted Open Meetings Act. Under the Act, certain notice and access requirements were applied "to a court while exercising rule-making authority and while deliberating or deciding upon the issuance of administrative orders."⁵² The court declared these requirements to be an unconstitutional "intrusion into the most basic day-to-day exercise of the constitutionally derived judicial powers."⁵³ The court's declaration was founded on the belief that "rulemaking, supervisory and other administrative powers" were "exclusively entrusted to the judiciary by the Constitution."⁵⁴ The court cited constitutional provisions in support of their position, specifically vesting general superintending control over all state courts in the supreme court and conferring upon the high court the power to make rules governing practice and procedure.⁵⁵

The decision by the Michigan court is reasonable considering the express constitutional approval of judicial rules and orders and considering the absence of any language regarding legislative involvement or oversight in such matters. An examination of the Michigan Constitution reveals the drafters used express language when related legislative activity was deemed appropriate or when judicial powers were to be constrained. Recognition of legislative involvement in matters of judicial rulemaking is found in the constitutional provision which states: "The jurisdiction of the court of appeals should be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court."⁵⁶ Limits

51. *In re "Sunshine Law,"* 400 Mich. 660, ___, 255 N.W.2d 635, 635 (1977).

52. *Id.* at ___, 255 N.W.2d at 636.

53. *Id.*

54. *Id.*

55. *Id.*

56. MICH. CONST. art. VI, § 10.

on judicial rulemaking power are found in the constitutional provision stating: "The supreme court shall by general rules establish . . . the practice and procedure in all courts The distinctions between law and equity . . . shall . . . be abolished. The office of master in chancery is prohibited."⁵⁷ Similarly, while recognizing the high court's power to determine prerogative and remedial writs, the constitution expressly prohibits the court from removing a judge.⁵⁸

In the second action in 1977, the Nevada high court heard a petition challenging a statute requiring openness in judicial proceedings involving the "consideration of rules or deliberation upon the issuance of administrative orders."⁵⁹ The statute was deemed "an unconstitutional infringement on the inherent powers of the judiciary which violates the doctrine of separation of powers."⁶⁰ Five Nevada high court rulings were cited which purportedly supported the contention that the judiciary has "inherent powers to administer its affairs, . . . which include rulemaking and other incidental powers . . . required for the administration of justice."⁶¹ The court noted that "these inherent powers exist independent of constitutional or statutory grant,"⁶² presumably meaning that they exist although not expressly recognized by written law. In addition, the court found "the only logical and legitimate source" of judicial rulemaking powers to be the constitutional provision vesting the state's judicial power in a court system which includes the supreme court.⁶³ The court concluded by noting the inherent power to make rules was "absolutely essential to the effective and efficient administration of our judicial system."⁶⁴ The court's decision was followed by a concurring opinion which suggested another constitutional basis, a provision granting the chief justice and the high court "the power and duty to supervise administration of Nevada's court system."⁶⁵

The Nevada decision is surprisingly conclusory about the terms

57. *Id.* § 5.

58. *Id.* § 4.

59. *Goldberg v. Eighth Jud. Dist. Ct.*, 93 Nev. 614, ___, 572 P.2d 521, 521 n.1 (1977).

60. *Id.* at ___, 572 P.2d at 522.

61. *Id.*

62. *Id.*

63. *Id.* at ___, 572 P.2d at 523 n.6.

64. *Id.* at ___, 572 P.2d at 523.

65. *Id.* at ___, 572 P.2d at 523 (Gunderson, J., concurring) (referring to Nev. CONST. art. VI, as amended § 19).

of the constitution it does cite. It is also misleading about provisions it does not cite and is unconsciously disrespectful of constitutional schemes in sister states. The reliance on separation of powers to support the decision is too conclusory. As demonstrated by experience in other American states, the protections afforded by separation of powers are not inconsistent with significant legislative involvement in judicial rulemaking, either by early oversight or subsequent modification. Similarly, in the Article III federal courts where judicial rulemaking is authorized by statute, there exist limits within which such authority may be exercised, including the use of advisory committees.

The Nevada high court ruling is misleading with regard to the constitutional scheme of the state government. While exhorting the principle of separation of powers, the court cited the "pertinent" part of the Nevada Constitution, article VI section 1,⁶⁶ which vests the judicial power in three courts, including the supreme court.⁶⁷ The court did not cite the part of section 1 which states: "The Legislature may also establish, as part of the system, Courts for municipal purposes only in incorporated cities and towns."⁶⁸ Beyond the power to establish municipal courts, the state legislature also has the constitutional authority to determine the jurisdiction of both justices of the peace,⁶⁹ and the district courts.⁷⁰ In Nevada, there is constitutional recognition of significant legislative involvement in creating and guiding certain courts. Such courts must be beyond any exclusive domain maintained by judges.

The Nevada court's assertion that the inherent judicial power to make rules is "absolutely essential" to effective and efficient judicial administration is disrespectful of the policy in other states. As noted earlier, many states grant their legislatures significant responsibilities for court rules—including the creation of codes of procedure. Such states would not consciously choose ineffective and inefficient means of administering courts. In Nevada, the high court would have difficulty demonstrating the inferiority of those states' judicial systems or some special circumstances relevant to Nevada.

66. NEV. CONST. art. VI, § 1.

67. *Goldberg*, 93 Nev. at ___, 572 P.2d at 523 n.6.

68. NEV. CONST. art. VI, § 1.

69. *Id.* at § 8.

70. *Id.* at § 6.

Examination of the five cases cited in support of the use of inherent powers demonstrates further that the Nevada Supreme Court's tenuous basis for finding that inherent judicial powers regarding all court rules were immunized from legislative action. In *State ex rel Kitzmeyer v. Davis*,⁷¹ the high court spoke of the inherent judicial power to override legislative funding decisions interfering with the exercise of the high court's "constitutional jurisdiction."⁷² *Young v. Board of County Commissioners*⁷³ also involved funding, but unlike *Kitzmeyer*, *Young* did not involve a state statute under which the relevant court's funding action could be fully sustained without assertions of inherent powers.⁷⁴ However, each case involved funding for a court performing significant constitutionally-assigned tasks of adjudication. *Sun Realty v. Eighth Judicial District Court*⁷⁵ involved a perceived misuse of inherent powers by the trial court.⁷⁶ *Sun Realty* involved the conditions which would be set during litigation for a retrial. The case failed to support a later decision employing the inherent powers concept in a rulemaking setting. The fourth case, *Dunphy v. Sheehan*,⁷⁷ involved the financial disclosure component of an Ethics in Government Law. In *Dunphy*, the court applauded the legislature for excluding the judiciary, indicating that the promulgation of a judicial ethics code was within the judiciary's inherent power and could not be touched by statute.⁷⁸ In so doing, the Nevada court cited support from only a Wisconsin high court ruling.⁷⁹ In the *Dunphy* decision, the court did note that the topic of financial disclosure statements was "under consideration" during discussions on the judicially-promulgated Canons of Judicial Conduct.⁸⁰ The final case referenced by the Nevada Supreme Court, *City of North Las Vegas v. Daines*⁸¹ involved the inherent power of municipal courts to dismiss court administrators appointed by city managers. The case addressed a dismissal based on an administrator's adherence to a manager's directives requiring reduced over-

71. 26 Nev. 373, 69 P. 689 (1902).

72. *Id.* at ___, 68 P. at 691.

73. 91 Nev. 52, 530 P.2d 1203 (1975).

74. *Id.*

75. 91 Nev. 774, 542 P.2d 1072 (1975).

76. *Id.* at ___, 542 P.2d at 1073.

77. 92 Nev. 259, 549 P.2d 332 (1976).

78. *Id.* at ___, 549 P.2d at 336.

79. *Id.* (citing *In re Kading*, 70 Wis. 408, 235 N.W.2d 409 (1975)).

80. *Id.* at ___, 549 P.2d at 337.

81. 92 Nev. 292, 550 P.2d 399 (1976).

time work by bailiffs and warrant officers and on an administrator's disobedience of judicial directives on holding night sessions of the municipal court.⁸² The City administrator urged there was no inherent court power to dismiss because the municipal court was of legislative, and not constitutional, creation.⁸³ The high court rejected the argument, finding municipal courts did exercise "judicial power" described in the constitution and were thus in need of "freedom and independence."⁸⁴

In three of the decisions in 1977 by the Nevada high court, the inherent powers concept was sustained in settings where judicial ability to carry out adjudicatory assignments was threatened. In the fourth, the concept was rejected for it was applied "to the handling of controversies between litigants" (payment of attorney's fees as condition of new trial) rather than to "the administration of the judicial system" wherein the court's adjudicatory function was threatened.⁸⁵ Only in the case involving a financial disclosure law for judges was there a matter arguably beyond the realm of adjudication. Like an open meetings law, such legislatively-compelled disclosures involve regulation of judicial conduct unrelated to adjudication. While there may be insignificant differences between laws on judicial rulemaking and laws on financial disclosure by judges, and there may be good reasons why both areas should be left to judicial regulation, where such regulatory authority inheres and why such regulatory authority is "absolutely essential" warrants a more complete discussion than was provided by the Nevada Supreme Court in 1977. The argument that financial disclosure laws and open meeting laws infringe upon judicial power in similar ways seems problematic. Financial disclosure laws involve regulation of a form of legal practice and the fairness of the decision making process during litigation, long recognized as areas suitable for high court initiative.⁸⁶ Open meeting laws involve the quasi-legislative

82. *Id.* at ___, 550 P.2d at 400 n.1.

83. *Id.* at ___, 550 P.2d at 400.

84. *Id.*

85. *Sun Realty v. Eighth Jud. Dist. Ct.*, 91 Nev. 774, ___, 542 P.2d 1072, 1073-74 (1975).

86. Incidentally, there are some states today where legislation requires financial disclosure statements by judges. See Rosenbaum and Lubet, *Financial Disclosure By Judges: Functional Analysis and Critique*, 40 U. FLA. L. REV., 241, 245 n.10 (1988). See also, *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), *cert. den.* 449 U.S. 1076 (1981) (upholding, in a separation of powers challenge, the federal Ethics in Government Act's requirements of financial disclosure by judges). Legislatures, as well, sometimes place restrictions on the techniques of judicial rulemaking. See, e.g., 28 U.S.C. § 2077 (Cum. Supp. 1989) (restrictions on federal appeals courts' rulemaking).

process for drafting future standards, long recognized as distinct from the adjudicatory process with which judges are accustomed.

V. CONCLUSION

Significant variations exist in American constitutional provisions on the judiciary. These variations frequently suggest that there ought to exist very different relationships between the relevant legislative and judicial branches. Yet, often these variations are overlooked. As a result, there has developed a sense of comparability which incorrectly presumes that legislative and judicial roles in overseeing legal practice are similar from state to state. It is time to acknowledge the differences in constitutional articles establishing state judicial systems and to appreciate the varying approaches state governments have chosen to the balance between legislative and judicial authority over the exercises of judicial power and the practice of law.